

Appendix C

Summaries of Personal Search Cases

United States Customs Service
Office of the Chief Counsel
November 12, 1999

United States v. Montoya de Hernandez, 473 U.S. 531 (1986)

Montoya arrived at LAX shortly after midnight following a 10-hour flight from Bogota. She did not speak English and had no family or friends in the United States. She explained that she had come to the United States to purchase goods for her husband's store in Bogota. She possessed \$5,000 in cash, mostly \$50 bills, but had no billfold. She indicated to the inspectors that she had no appointments with merchandise vendors, but planned to ride around Los Angeles in taxicabs visiting retail stores such as J.C. Penney and K-Mart in order to buy goods for her husband's store with the \$5,000.

She admitted that she had no hotel reservations but stated that she planned to stay at a Holiday Inn. She could not recall how her airline ticket was purchased. When the inspectors opened her one small suitcase, they found four changes of "cold weather" clothing. She had no shoes other than the high-heeled pair she was wearing. Although she possessed no checks, waybills, credit cards, or letters of credit, she did produce a Colombian business card and a number of old receipts, waybills, and fabric swatches displayed in a photo album.

The inspectors suspected her of being a "balloon swallower." A female Customs inspector conducted a patdown and strip search. During the search the inspector felt her abdomen area and noticed a firm fullness, as if she were wearing a girdle. The search revealed no contraband, but the inspector noticed that she was wearing two pair of elastic underpants with a paper towel lining the crotch area.

Montoya was told that she was suspected of smuggling drugs in her alimentary canal. She agreed to the inspector's request that she be x-rayed at a hospital, but in answer to the inspector's query stated that she was pregnant. She agreed to a pregnancy test before the x-ray. She withdrew the consent for an x-ray when she

learned that she would be handcuffed en route to the hospital. She was given the option of returning to Colombia on the next available flight, agreeing to an x-ray, or remaining in detention until she produced a monitored bowel movement. She chose the first option and was placed in a Customs office under observation. She was told that if she went to the toilet she would have to use a wastebasket in the women's rest room, in order that female Customs inspectors could inspect her stool for balloons or capsules carrying narcotics. The inspectors refused her request to place a telephone call.

She sat in the Customs office, under observation, for the remainder of the night. During the night Customs officials attempted to place her on a Mexican airline that was flying to Bogota via Mexico City in the morning. The airline refused to transport her because she lacked a Mexican visa necessary to land in Mexico City. She was not permitted to leave, and was informed that she would be detained until she agreed to an x-ray or her bowels moved. She remained detained in the Customs office under observation, for most of the time curled up in a chair leaning to one side. She refused all offers of food and drink, and refused to use the toilet facilities. She exhibited symptoms of discomfort consistent with "heroic efforts to resist the usual calls of nature."

At the shift change at 4:00 p.m. the next afternoon, almost 16 hours after her flight had landed, she still had not defecated or urinated or partaken of food or drink. At that time Customs officials sought a court order authorizing a pregnancy test, an x-ray, and a rectal examination. The magistrate judge granted an order just before midnight that evening, which authorized a rectal examination and involuntary x-ray, provided that the physician in charge considered her claim of pregnancy. She was taken to a hospital and given a pregnancy test, which later turned out to be negative. Before the results of the pregnancy test were known, a physician conducted a rectal examination and removed from respondent's rectum a balloon containing a foreign substance. Montoya was then placed formally under arrest. By 4:10 a.m. she had passed 6 similar balloons; over the next 4 days she passed 88 balloons containing a total of 528 grams of 80% pure cocaine hydrochloride.

Held: The detention of a traveler at the border, beyond the scope of a routine Customs search and inspection, is justified at the beginning if Customs officers, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal. Private and public interests must be balanced when law enforcement officers make a limited intrusion on less than probable cause. The reasonable suspicion standard fits well into the situations involving swallowers at the border because this type of smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search. Governmental interests in stopping smuggling at the border are high. Under this standard, officers at the border must have a "particularized and objective basis for suspecting the particular person" of being a swallower.

The inspectors' suspicion was a commonsense conclusion about human behavior upon which practical people are entitled to rely. They had reasonable suspicion at the beginning of the detention.

The second issue is whether Montoya can be detained incommunicado for almost 16 hours before seeking a warrant. Her detention was long, uncomfortable, and humiliating, but both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country. With reasonable suspicion, the Customs officers were not required by the Fourth Amendment to pass Montoya and her 88 cocaine-filled balloons into the interior. Her detention for the period of time necessary to either verify or dispel the suspicion was reasonable.

Since the initial detention of Montoya with reasonable suspicion was reasonable and her continued detention was reasonable, the evidence is admissible.

Buritica v. United States, No. C-95-3354-VRW (N.D. CA 1998)

Plaintiff Amanda Buritica arrived at San Francisco International Airport on a Singapore Airlines flight from Hong Kong on September 22, 1994 (returning from an around-the-world trip). This was considered a high-risk flight because recent drug seizures (at least one internal carrier) had been made from passengers on this flight in the past. Buritica was approached in the Customs area and asked some questions by a Customs inspector. According to the inspector, Buritica was nonresponsive to her questions. So she was brought to secondary and asked further questions by another inspector.

Ultimately Buritica was suspected of being an internal carrier and the inspectors requested approval to conduct a pat-down. There were numerous factors about Buritica which caused this suspicion, including obvious nervousness and discomfort; an inability to correctly answer simple questions regarding her itinerary, where she stayed, and what she did; and a discrepancy regarding her stated plans to leave San Francisco for New York immediately and her tickets, which indicated a planned overnight stay.

With these factors, the inspector obtained supervisory approval for a pat-down search. During the pat-down, the inspector noted that Buritica's stomach was somewhat rigid (possible indication of internal carrying). The inspector brought this information to the attention of a supervisor who subsequently approved a strip search. The strip search revealed a wad of toilet paper (sometimes used by internal carriers) and no signs of diarrhea, of which Buritica repeatedly complained to the inspector. The supervisor considered the results of the strip search, the pat-down, and the factors listed above, plus the fact that Buritica was from Port Chester, a location where a number of internal carriers had been seized in the prior year, and concluded that there was reasonable suspicion that Buritica was an internal carrier and requested her consent for an x-ray. Buritica gave her consent to the x-ray. In fact, Buritica gave her consent in writing four different times (in the search room, at the airport medical site, and at the hospital), and orally gave her consent repeatedly to the doctors treating her.

The first x-ray was taken at the San Francisco International Airport Medical Group (SFIAMG), and according to the physician, the x-ray was inconclusive, but suspicious for foreign bodies. He also stated to the inspectors that "you know, you

could also hold the suspect for a monitored bowel movement or you could also have the x-ray repeated."

The Customs Inspectors agreed with the doctor's advice and transported Buritica to the County hospital (and brought the first x-ray to have it read by a radiologist). The radiologist agreed that the x-ray was suspicious, and Buritica was admitted to the hospital (with an x-ray suspicious for foreign bodies, health and safety become an issue as well as law enforcement, as the death of recent internal carriers that avoided detection confirms) where she signed two additional medical consent forms, and had her first two bowel movements, both of which were negative for contraband.

At the hospital, the medical staff provided Buritica with a laxative (GoLytely). After taking the laxative, Buritica had 22 additional uses of the porta potty during the night, all negative for contraband. At 9:00 a.m. the following morning a second set of x-rays were taken, upon the orders of one of the doctors at the hospital. At 1:10 p.m. (on this second day) the doctor notified Customs that the x-ray showed the intestines were clear. However, the doctor also advised Buritica that she was not yet being released, as she needed to be treated for dehydration. At 1:15 this information was communicated to a supervisory Customs inspector, who then ordered the inspectors out of the hospital room but instructed them to remain in the area to return Buritica to the airport. At approximately 6:00 p.m. on the day after her arrival, Buritica was returned to the terminal, where she left on a flight for New York.

In her judicial complaint and at trial, plaintiff Buritica set forth a number of allegations including, e.g., lack of adequate training on the part of the Customs officials, that the strip search was a full, naked exam (not just of the suspected part of the body), that there was no "reasonable suspicion" because she did in fact have the articles Customs said were missing (panties, toiletries, credit cards and checks), that the consent(s) she gave were coerced, and that Customs officers failed to re-evaluate the propriety of continuing the personal search and detention at various steps along the way.

Held: At the conclusion of the trial, the jury rendered verdicts in favor of Buritica for \$450,000 against the individual Customs employees under Buritica's *Bivens* allegations (under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), Federal employees may be held personally liable for violating an individual's constitutional rights). Additionally, the presiding judge awarded \$450,000 to Buritica against the United States under Buritica's Federal Tort Claims Act allegations (a plaintiff must elect between *Bivens* and FTCA remedies based upon the same violation of rights, Buritica elected the FTCA remedy against the Government). The judge's opinion made little in the way of specific findings regarding the propriety of the search, but indicated that the search did not become unreasonable until some time after the detention for MBM began. Therefore, it appears that the judge believed the initial search and detention to be based upon reasonable suspicion, but that the extended detention at some undefined point became unreasonable. Prior to the Government's determination of whether or not to appeal the decision, Buritica settled the case.

***United States v. Odofin*, 929 F.2d 56 (2d Cir. 1991)**

On June 3, 1989, Odofin arrived at JFK from Nigeria. He appeared nervous, rushed, spoke loudly, and insulted several inspectors. He was carrying a United States passport beginning with the letter "Z" indicating that it was "lost" and replaced overseas. It was issued in Nigeria (a known source country of narcotics). Odofin said he was born in Texas, was a resident of the United States and had been visiting his sick mother in Nigeria for a month, although he could not specify the nature of his mother's illness. He then stated that he had been in Nigeria to set up a consulting business but was unable to offer any specific information about that business. The travel dates marked on the passport were not consistent with his story. He spoke with a marked Nigerian accent. Odofin said he was an accountant for a Wall Street brokerage firm but could neither name the firm nor produce documents verifying his employment. Odofin refused to consent to an x-ray and was taken to the hospital for a monitored bowel movement. During the first several days at the hospital he refused any laxatives. Later he accepted laxatives once a day (the recommended dosage was once every fifteen to twenty minutes).

On June 8, a lawyer for Odofin appeared before a magistrate seeking his release. The magistrate held that it was reasonable to continue his seizure until either an x-ray was obtained or until he had a bowel movement. On June 11, Odofin obtained permission to urinate. Once inside the bathroom Odofin began to defecate while flushing the toilet continuously. When inspectors tried to pull Odofin off the toilet he injured one of them by pushing him into the bathroom door.

A June 23 court order was issued permitting the hospital to x-ray Odofin but he would not hold still for the x-ray. On June 27 another court order authorized the hospital to take whatever steps it deemed necessary to protect Odofin's life. On June 27, Odofin passed four balloons containing 43.9 grams of heroin.

Held: Seizures or detentions for MBMs are reasonable under the Fourth Amendment provided there is reasonable suspicion. Given reasonable suspicion how long may an individual be detained without judicial approval? The court refused to draw any bright line rule, but held that the length of Odofin's detention was governed by his own actions, leaving the inspectors with but two options, continue the detention or turn loose a suspect they reasonably believed to be carrying narcotics. The judge concluded "they had the right to wait him out moment-to-moment, even though Odofin's control made these moments cumulate to days and even weeks."

***Garcia v. United States*, 913 F. Supp. 905 (E.D. PA 1996)**

Two passengers, James Garcia and Evaristo Vazquez, arrived at Newark International Airport on February 3, 1994, upon their return from Jamaica. Garcia and Vazquez were separately questioned by inspectors. Garcia could not explain how he was getting home from the airport and he had very little cash on him, he was very nervous, he could not identify Vazquez's occupation, and he gave conflicting responses about his length of stay in Jamaica. Vazquez also was nervous and could not explain how he was getting home from the airport, he exhibited high blood pres-

sure, appeared bulky, was unemployed, and paid cash for a ticket which was purchased by someone else. Garcia and Vazquez were both suspected of being internal carriers. They both consented to be x-rayed and were taken to the hospital and x-rayed. Garcia's x-ray was negative, but after several x-rays, the doctors believed Vazquez had a foreign body in his stomach. Garcia was released, but Vazquez was detained for a monitored bowel movement. After two clear bowel movements Vazquez was again x-rayed. This x-ray was negative and Vazquez was released. At the time they filed their complaint, Garcia and Vazquez held a press conference claiming, among other things, that they had been singled out and discriminated against because of their age and ethnicity.

Held: The judge adopted the Customs inspectors' version of events and found that the searches were based upon reasonable suspicion. The judge ruled "although we cannot reduce [reasonable suspicion] to a neat set of legal rules, we find that under the totality of the foregoing articulated and particularized factual circumstances a sufficient reasonable suspicion existed that plaintiffs were smuggling narcotics internally. Accordingly the conduct of the customs officers was within constitutional and common law bounds." The judge also concluded that "in order to perform their crucial function of protecting our nation's borders, customs officers can not be subjected to 'unrealistic second-guessing' by the courts." The judge did, however, express discomfort regarding two aspects of the case: the practice of shackling the passenger for transportation to the hospital; and the practice of having MBM passengers search their own stool.

United States v. Lamela, 942 F.2d 100 (1st Cir. 1991)

Jose Lamela arrived in San Juan from Colombia. Jose was asked by a Customs officer to produce an airline ticket. He made a contradictory remark as to the purpose of his trip. The Customs officer noticed that Jose appeared nervous, was wearing baggy clothing, and that his midsection appeared to be bulky. He was removed to a private area and a patdown of his midsection disclosed a bulky object. He was told to remove his trousers, revealing a girdle containing several packets of cocaine.

Held: The strip search was based on reasonable suspicion.

United States v. Yakubu, 936 F. 2d 936 (7th Cir. 1991)

Yakubu arrived in Chicago from Nigeria. The Customs officer noticed that Yakubu had taken two other recent trips to Nigeria and had purchased his one-way ticket with cash from a travel agency often used by Nigerian heroin smugglers. Bowel movement and digestion suppressants were found in Yakubu's luggage. Yakubu objected to the patdown of his person, which revealed a rigid stomach. He became nervous when asked about contraband and refused to consent to an x-ray. When asked if he had eaten any "ebba" lately, Yakubu gave several answers before admitting he had. "Ebba" is used to practice a swallowing technique. He said his wife was waiting for him in the terminal, though no one was found, and he provided two false phone numbers in an effort to contact her. Yakubu was detained so that his bowel movements could be monitored. He passed 82 balloons containing heroin.

Held: The facts established reasonable suspicion that Yakubu was smuggling contraband in his alimentary canal.

United States v. Oyekan, 786 F.2d 832 (8th Cir. 1986)

Two Nigerian women arrived at St. Louis International Airport from Nigeria via London with a small amount of luggage. Oyekan stated that the purpose of her trip was to buy cosmetics and that she intended to stay about a week. Keleni gave a similar account of her plans. Both carried only cash, \$900.00 and \$800.00, respectively. They both claimed to be traveling separately but had consecutively numbered tickets and planned to stay at the same hotel, the name of which was identically misspelled on their travel documents. They paid for their tickets in cash and had no friends or relatives in the United States. Subsequently, a patdown and a strip search revealed nothing but the inspectors remained suspicious.

Held: These articulable facts which were particularized as to these women are sufficient to reasonably suspect that they were alimentary canal smugglers, thus justifying an involuntary x-ray examination.

United States v. Handy, 788 F.2d 1419 (9th Cir. 1986)

Handy was returning from Thailand, a known source country for narcotics. She was exceedingly nervous and trembling. In her purse were found a lubricant, dental floss, and an anti-laxative. It was known that these materials were commonly used by individuals transporting controlled substances in body cavities.

When asked about the lubricant, dental floss and anti-laxative, she gave a fanciful story that she did not know how those items got into her purse, that she had dropped her purse, and when she picked it up, those items were in it. Her posture and gait were not normal. She shuffled as she walked and was not able to move freely. Her nose was running, she was sniffing, and she had difficulty finding her passport in her purse. She had trouble finishing her sentences and in making sense out of what she was saying. All of these indicated that she may have been at the time under the influence of some kind of narcotic. A patdown search was conducted disclosing a bulge. During the strip the bulge was determined to be a washcloth in her panties. She stated that her period had started. Her use of a washcloth was suspicious, however, because tampons had been found in her purse.

The resulting body cavity search conducted at the local medical facility revealed rubber receptacles containing heroin.

Held: The objective, articulable facts upon which the Customs officers relied here are such that they would have led an experienced and prudent Customs officer to reasonably suspect Handy was concealing contraband in her body cavity.

United States v. Shreve, 697 F.2d 873 (9th Cir. 1983)

Shreve arrived in Los Angeles from Lima, Peru, and Customs inspectors noticed that he was walking in an unnaturally erect and stiff manner, suggestive of body cavity smuggling. Shreve was an unemployed carpenter, and had paid cash for his airline ticket. He traveled alone on a newly issued passport; his stay in Peru, a known cocaine source country, had been short and he knew no one there; and experienced officers noted he was unusually talkative, overly friendly, and nervous.

Based on these observations, inspectors conducted a patdown search. During the inspection, the inspectors noticed Shreve's nervousness and that he continued to move in a constrained fashion suggestive of body cavity smuggling. Shreve's pupils were dilated and his speech slurred.

An examination of Shreve's luggage revealed restaurant and hotel receipts that suggested he had consumed only beverages during the last three days in Peru, a practice characteristic of body cavity smuggling. The search also uncovered a bottle of oil that could be used to lubricate objects inserted into the rectum.

An x-ray search revealed foreign objects inside his body, which were later determined to be filled with cocaine.

Held: In this case, the facts noted by the Customs inspectors provide ample support for their determination that there was clear indication of body cavity smuggling. The x-ray search was reasonable in the Ninth Circuit.

Velez v. United States, 693 F. Supp. 51 (S.D.N.Y. 1988)

On September 28, Velez arrived at JFK from Colombia. Inspectors developed objective, articulable facts that Velez was smuggling drugs in his alimentary canal. He refused to consent to an x-ray.

At 8:30 p.m. he was taken to the hospital for an involuntary x-ray under the border search exception. The initial x-ray was interpreted tentatively as positive, but this was only a tentative reading. A radiologist was needed to give a definitive interpretation. Velez was detained and placed in a hospital room.

A radiologist came on duty at the hospital at 8:00 a.m. the next morning, September 29. The x-ray should have been given to the radiologist at that time. Due to the neglect of both the hospital and the Customs Service, it was not. Velez had a bowel movement at 2:00 p.m. on September 29. A radiologist interpreted the initial x-ray on September 30 as negative. No narcotics were passed. A second x-ray was taken on September 29, which was negative. Velez was detained in the hospital for almost another two days.

Held: The initial x-ray of Velez was reasonable but Velez is entitled to damages of \$25,000 against the Customs Service under the Federal Tort Claims Act for false imprisonment for the two-day period from the morning of September 29 to the morning of October 1.